CERTIFICATE OF SERVICE

I, Christine Andersen, a legal secretary at the law firm of Keller and Heckman LLP, hereby certify that on this 8th day of July 1998, copies of the foregoing Emergency Petition for Rulemaking of the National Rural Telecommunications Cooperative were hand-delivered to the following:

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ATTACHMENT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 96-3650-CIV-NESBITT

CBS INC.; FOX BROADCASTING CO.; CBS TELEVISION AFFILIATES ASSOCIATION; POST-NEWSWEEK STATIONS FLORIDA, INC.; KPAX COMMUNICATIONS, INC.; LWWI BROADCASTING, INC.; AND RETLAW ENTERPRISES, INC.,

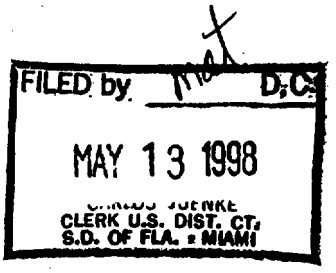
Plaintiffs,

vs.

PRIMETIME 24 JOINT VENTURE,

Defendant.
_____/

ORDER AFFIRMING IN PART AND REVERSING IN PART MAGISTRATE JUDGE JOHNSON'S REPORT AND RECOMMENDATION



This cause comes before the Court upon Magistrate Judge Linnea R. Johnson's Report and Recommendation ("Report" or "R&R"), entered July 2, 1997 (D.E. #148), regarding Plaintiffs'[1] Motion for Preliminary Injunction, filed March 11, 1997 (D.E. #45). PrimeTime 24 Joint Venture's ("PrimeTime 24") objections to the Report and Recommendation were timely filed on August 1, 1997 (D.E. #156). Therefore, pursuant to 28 U.S.C. § 636 the Court must review the Report de novo.

[1] CBS Inc., Fox Broadcasting Co., CBS Television Affiliates Association, Post-Newsweek Stations Florida, Inc., KPAX Communications, Inc., LWWI Broadcasting, Inc., and RETLAW Enterprises, Inc. (collectively "Plaintiffs")

After due consideration of the Report, PrimeTime 24's Objections, Plaintiffs' Response, and the entire record, the Court **AFFIRMS in part** and **REVERSES in part** the Report for the following reasons.

INTRODUCTION

This is a copyright infringement action. Plaintiffs own exclusive rights in copyrighted network television programs that are retransmitted by PrimeTime 24 via satellite to its subscribers nationwide. The principal issue is whether PrimeTime 24's actions are permitted by the Satellite Home Viewers Act ("SHVA"), 17 U.S.C. § 119, which provides a limited statutory license to satellite carriers.[2] The license in the SHVA permits PrimeTime 24 to transmit network programming only to "unserved households".

An "unserved household" is defined in 17 U.S.C. § 119(d)(10) as

> a household that -
>
> (a) cannot receive, through the use of a conventional outdoor rooftop receiving antenna, an over-the-air signal of grade B intensity (as defined by the

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[2] In addition, PrimeTime 24 has a contractual license from FoxNet, Inc., a subsidiary of Plaintiff Fox Broadcasting Company. The contractual license reiterates the standard provided in 17 U.S.C. § 119.

Federal Communications Commission) of a primary network station affiliated with that network, and

(B) has not, within 90 days before the date on which that household subscribes, either initially or on renewal, to receive secondary transmissions by a satellite carrier of a network station affiliated with that network, subscribed to a cable system that provides the signal of a primary network station affiliated with that network."

17 U.S.C. § 119(d)(10) (emphasis added). The principal dispute between the parties is over the meaning of the phrase "over-the-air signal of grade B intensity (as defined by the [FCC])" in Section 119(d)(10)(A). Plaintiffs contend that this means a signal of the intensity defined by the FCC as "grade B,"[3] and that it is an objective standard. PrimeTime 24 contends that the statute permits it to rely on subjective statements by subscribers about "acceptable" picture quality in determining whether to provide network programming to its subscribers.

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[3] "Grade B intensity" is defined by the FCC in terms of signal strength: 47 dBu for television channels 2-6, 56 dBu fr television channels 7-13, and 64 dBu for television channels 14-69. 47 C.F.R. §73.683(a) (1996). "Grade A" refers to a stronger signal (i.e. with higher dBu levels), usually found closer to a transmission tower.

BACKGROUND[4]

A. The Plaintiffs

Plaintiffs CBS, Inc. ("CBS"), and Fox Broadcasting Co. ("Fox") are two separate national television broadcast networks. The remaining Plaintiffs consist of several individual CBS network stations and a trade association of CBS affiliate stations. CBS and Fox own exclusive rights in copyrighted network television programs such as "60 Minutes" and "The Simpsons". They broadcast their network programs nationwide through a network of local television stations that, in turn, transmits the network's programming to viewers in their local markets. These local television stations - affiliates - are licensed to broadcast network programs to their local markets.

The partnership between national broadcast networks and their affiliates enables local network stations to offer the viewing public a mix of 1) national programming provided centrally by the networks, 2) local programming, such as news, weather, and public affairs, produced in-house by many local stations, and 3) syndicated programming acquired by local stations from third parties. For example, the local CBS

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[4] This section is drawn from Magistrate Judge Johnson's Report, and the transcript of the preliminary injunction hearing.

affiliate provides its viewers with CBS's nationwide network programming, local news and weather, as well as programs from third parties (syndicated programming). This programming is available to the public for free, as long as they can receive the local broadcast signal.

As well as relying upon each other to provide programming to households nationwide, networks and affiliates rely upon each other financially. Both network stations and local affiliates derive a majority of their revenue from advertising (commercials). The price of such advertising is dependent on the type and size of a program's audience. The advertising dollars are split such that the network receives the advertising dollars during network commercials, and the local affiliate receives the advertising dollars during local commercials. Although local stations sell time on their programming, a majority of a station's revenues are derived from advertising on network programs. See R&R at 6.

Networks and affiliates both promote the programming of the other so as to increase a program's audience. For example, during a network program, there are often advertisements for a local program that will air adjacent to the network program. Given that advertising dollars increase when viewership

increases, maximizing viewership for both network and local stations is of great importance to maintaining the network/affiliate relationship.

B. The Exception For Satellite Delivery to "Unserved Households"

CBS and Fox are generally entitled to control how and when their programming is made available to the public. In 1988, however, Congress crafted the "compulsory license" exception for satellite carriers. This exception, codified in 17 U.S.C. § 119, allows satellite carriers to deliver network stations to satellite dish owners without the network's permission. The exception, however, is limited to "unserved households". See 17 U.S.C. § 119(1); supra, at 2-3.

One of the reasons for the exception was to provide network service to households that could not receive broadcast signals over the air. See H.R. Rep. No. 100-887, part 1, at 14 (1988); see, e.g., 134 Cong Rec. H9660-01, 1988 WL 17005 (Cong. Rec.) (Oct. 5, 1988) ("The goal of the bill . . . is to place rural households on a more or less equal footing with their urban counterparts.") (remarks of Rep. Kastenmeier).

C. PrimeTime 24

It is not disputed that Defendant PrimeTime 24 is a "satellite carrier" as defined in 17 U.S.C. § 119(d). PrimeTime 24 transmits network programming (including CBS and Fox programming) to satellite dish owners ("subscribers") nationwide. PrimeTime 24 does not retransmit the signals of each local affiliate to its subscribers in that area, but rather offers the same network signals for sale to its subscribers.[5] Specifically, PrimeTime 24 has a contractual arrangement with a CBS affiliate and a Fox affiliate and broadcasts the programming from those affiliates to all of its subscribers. PrimeTime 24's broadcast substitutes the affiliates' local advertising with national advertising. See R&R at n.6.

PrimeTime 24 sells its service through distributors, such as DirecTV, or directly to owners of certain satellite dishes. PrimeTime 24 offers two network programming packages, PrimeTime East and PrimeTime West, as well as FoxNet, which offers Fox network programs. PrimeTime East is a package of ABC, CBS, and NBC programming from network stations located on the East Coast.

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[5] PrimeTime 24's service differs from cable which is required to carry local stations. See Turner Broadcasting Sys. v. FCC, 117 S. Ct 1174 (1997).

PrimeTime West is a package of ABC, CBS, and NBC programming from network stations located on the West Coast. Subscribers can receive PrimeTime East, PrimeTime West and FoxNet together.

One of the advantages to PrimeTime 24's services is that viewers can watch network programs several hours later (or earlier) by watching a station from a distant time zone, and can see sports events (such as NFL football) that are not available locally.

PrimeTime 24 does not have a license from CBS to retransmit its programming. PrimeTime 24 has obtained a contractual license from Fox through an agreement with a Fox subsidiary, FoxNet, but that license extends only to "unserved households."

PrimeTime 24 attempts to comply with the SHVA by limiting its services to "unserved households." PrimeTime 24's contracts with its distributors require that the distributor sell satellite services only to eligible households under 17 U.S.C. § 119. To help determine whether a potential subscriber qualifies as an "unserved household," distributors are required to ask three questions: 1) whether they intend to use the programming for residential use; 2) whether they have subscribed to cable in the last 90 days; and 3) whether the household receives an acceptable picture over the air.

PrimeTime 24 will typically supply services to persons who state that: 1) they intend to use the programming for residential use, 2) have not subscribed to cable in the last 90 days, and 3) do not receive an acceptable picture over the air. PrimeTime 24 does not independently verify the strength of the network signals received by its subscribers. Neither does PrimeTime 24 check the location of potential subscribers to determine if they are likely to be able to receive a signal of grade B intensity.

D. The Dispute

Plaintiffs contend that PrimeTime 24's efforts to limit sales to "unserved households" are woefully insufficient. First, Plaintiffs argue that PrimeTime 24 has placed too much emphasis on individual subscribers' perception of the picture quality they receive over the air, and that such emphasis is questionable considering that many people seek PrimeTime 24's services for reasons unrelated to the fact that they cannot receive free network programming over the air.[6] Second, Plaintiffs argue that

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[6] Such reasons include: 1) access to additional network stations, 2) ability to watch network programs several hours earlier or later by watching stations from a distant time zone, 3) access to sports programs that are unavailable locally, and 4) obtaining network programming without installing or maintaining an antenna. See R&R at 10.

PrimeTime 24 will sell its services to any household without checking its location to confirm that it is unlikely to receive a signal of "grade B" intensity.[7] As a result, PrimeTime 24 provides its services to hundreds of thousands of individuals who do not fall within Congress' definition of an "unserved household."

According to Plaintiffs, PrimeTime 24's actions have upset the network/affiliate relationship because individuals who subscribe to PrimeTime 24's service do not watch local network programs provided by the affiliates. This is due to the fact that PrimeTime 24 does not transmit local affiliate programming or advertising. Instead, as mentioned previously, PrimeTime 24 transmits the network programs broadcast by the handful of affiliates with which it has a contractual agreement, and substitutes local advertising with national advertising. Accordingly, Plaintiffs contend that PrimeTime 24's violation of the SHVA is reducing the number of viewers for local affiliate programming and advertising, which in turn reduces an affiliate's revenue stream.

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[7] As referred to in 17 U.S.C. § 119, supra at 2-3.

After four days of oral argument on Plaintiffs' Motion for Preliminary Injunction, the Magistrate Judge entered a Report granting the request for injunctive relief. The Report stated that Plaintiffs had met their burden of establishing that PrimeTime 24's efforts to comply with the SHVA were insufficient and constituted a willful or repeated violation of the act.

PrimeTime 24 has filed lengthy objections to the Report. Three main issues emerge from the objections: 1) whether picture quality should be considered when determining whether a household falls within the definition of "unserved households;" 2) whether Plaintiffs met their burden of demonstrating that PrimeTime 24 is providing service to ineligible households and that such violations were willful or repeated; and 3) whether PrimeTime 24 sufficiently rebutted Plaintiffs' evidence.

In addition to those primary issues, PrimeTime 24 contends that injunctive relief should not be granted because Plaintiffs have not suffered irreparable harm, the balance of harms do not favor an injunction, the public interest will not be served by an injunction, and the proposed injunction would not be manageable.

DISCUSSION

In order to grant a preliminary injunction, a district court need not find that the evidence guarantees a verdict in favor of the plaintiff. Rather, it must determine that the evidence establishes: "(1) a substantial likelihood of success on the merits; (2) a substantial threat of irreparable injury if the injunction were not granted; (3) that the threatened injury to the plaintiffs outweighs the harm an injunction may cause the defendant; and (4) that granting the injunction would not disserve the public interest." Levi Strauss & Co. v. Sunrise Int'l Trading Inc., 51 F.3d 982, 985 (11th Cir. 1995) (citing Church v. City of Huntsville, 30 F.3d 1332, 1341-42 (11th Cir. 1994)).

A. Substantial Likelihood of Success

1. "Unserved Households"

a. PrimeTime 24's Interpretation

PrimeTime 24 maintains that the Magistrate Judge erred in finding that Plaintiffs established a likelihood of success in proving that PrimeTime 24 violated the SHVA. The Magistrate's first error, according to PrimeTime 24, involved the definition of "unserved households." PrimeTime 24 argues that the intent of the SHVA is to provide clear reception of network signals to households

that cannot now receive them ("unserved households"). Thus, whether a household receives a clear picture is of great significance to determining whether that household is"unserved" un the statute. See Obj. at 20. PrimeTime 24 contends that the Magistrate incorrectly ignored the importance of picture quality and therefore failed to consider that PrimeTime 24's policy of providing services to individuals who state that they cannot receive an acceptable picture over the air conforms with the SHVA.

b. Statutory Interpretation

The SHVA defines an "unserved household" as "a household that (A) cannot receive, through the use of conventional outdoor rooftop receiving antenna, an over-the-air signal of grade B intensity (as defined by the Federal Communications Commission) of a primary network station affiliated with that network." 17 U.S.C. Section 199(d)(10) (emphasis added). Despite PrimeTime 24's contention that clear reception of network signals is of significance, the statute does not discuss clear reception. Rather, the plain language of the statute adopts the FCC's definition of a grade B signal (an objective test) to determine whether a household is an "unserved household."

A basic tenet of statutory construction is that a court should give the statutory language its ordinary and plain meaning. See Caminetti v. United States, 242 U.S. 470, 485 (1917); United States v. Scrimgeour, 636 F. 2d 1019, 1022 (5th Cir. 1981). The Magistrate Judge correctly gave the statute its plain meaning and found that Congress established an objective test to determine which households a satellite carrier could rebroadcast network programs.

In addition, the Magistrate concluded that even if the court considered legislative history, the result would be the same. The Report noted that Congress rejected a bill proposed by PrimeTime 24 and other satellite carriers that would have permitted viewers to receive network services by satellite if they submitted affidavits indicating that they did not receive adequate service over the air. See R&R at n.16. Although Congress rejected this bill, PrimeTime 24 continues to argue to this Court that Congress meant to adopt such a standard. However, as noted by the Report, "[w]hen Congress has expressly considered and rejected a proposal to include particular provisions in a statute, 'there could hardly be [a] clearer indication' that a law does not have the meaning it would have had if the proposal had been accepted." R&R at 29-30 (citing Tanner v. United States, 483 U.S. 107, 125 (1987).

c. **Grade B Intensity**

The Report also determined that the FCC defined "a signal of grade B intensity" in 47 C.F.R. § 73.683(a).[8] PrimeTime 24 disputes this and argues that the FCC never precisely defined a grade B signal; rather, the FCC's guidelines as stated in 47 C.F.R. §73.683 only set forth median field strengths and contours, and have nothing to do with whether a household can receive a signal of grade B intensity through a conventional rooftop antenna. See Obj. at 21.

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[8] Section 73.683 provides:

(a) In the authorization of TV stations, two field strength contours are considered. These are specified as Grade A and Grade B and indicate the approximate extent of coverage over average terrain in the absence of interference from other television stations. Under actual conditions, the true coverage may vary greatly from these estimates because the terrain over any specific path is expected to be different from the average terrain on which the field strength charts were based. The required field strength, F (50,50), in dB above one micro-volt per meter (dBu) for the Grade A and Grade B contours are as follows:

	GRADE A(dBu)	Grade B(dBu)
Channels 2-6	68	47
Channels 7-13	71	56
Channels 14-69	74	64

(b). . . the curves should be used with appreciation of their limitations in estimating levels of field strength. Further, the actual extent of service will usually be less than indicate by these estimates due to interference from other stations. Because of these factors, the predicted field strength contours give no assurance of service to any specific percentage of receiver locations within the distances indicated. In licensing proceedings these variations will not be considered.

The FCC acknowledges that true coverage or signal strength will vary greatly from its estimates. See 47 C.F.R. §73.683 ("Under actual conditions, the coverage may vary greatly from these estimates because the terrain over any specific path is expected to be different from the average terrain on which the field strength charts were based.") As particular households are the focus of the SHVA, PrimeTime 24 argues that a grade B intensity signal should be defined with the intent of Congress in mind - a signal that produces a picture with acceptable quality.

Although PrimeTime 24 is correct that there are limitations on how the FCC estimates a grade A and grade B signal, the code specifically states that the FCC will not consider variations when estimating a signal's strength. In particular, 47 C.F.R. § 73.684(a) states that "[a]ll predictions of coverage . . . shall be made without regard to interference and shall be made only on the estimated field strength." Thus, although the FCC's method of estimating a grade B signal is imperfect, such imperfections are disregarded. See 47 C.F.R. § 73.683(b), supra, at n.8.

In stating that the FCC shall define a signal of grade B intensity, Congress endorsed the FCC's method of determining such signals. That this was Congress' intent is supported by a House Judiciary Committee Report prepared a few weeks after it drafted

the definition of "unserved household," which stated that a signal of grade B intensity was as defined by the FCC, currently in 47 C.F.R. § 73.683(a). H.R. Rep. No 100-887, pt. 1, at 26 (1988) (emphasis added).

PrimeTime 24 arguments in favor of a subjective test are essentially that signal intensity is not the proper standard by which to achieve Congress' objective in the SHVA. Whether Congress' has chosen the best standard, however, is not for the Court to decide. The duty of the Court is to construe statutes as Congress reasonably intended in accordance with its language. See Caminetti, 242 U.S. at 485; Scrimgeour, 636 F.2d at 1022.

Congress clearly defined a grade B signal based upon the FCC's objective standard and not on whether a household received acceptable picture quality. PrimeTime 24's emphasis on the latter runs contrary to the SHVA. Accordingly, the Court agrees with the Magistrate Judge's finding that the SHVA defines "unserved household" under the FCC's objective standard, and not on a particularized finding that "a" or "certain" households receive acceptable picture quality.

2. Evidence Establishing Likelihood of Success

Next, PrimeTime 24 argues that even if signal strength is the ultimate determinant of eligibility under the SHVA, Plaintiffs' evidence does not support injunctive relief. In particular, PrimeTime 24 attacks Plaintiffs Longley-Rice maps,[9] and the results of Plaintiffs' signal strength tests in the Miami area. PrimeTime 24 contends that this evidence was either inadmissable or unreliable. Furthermore, PrimeTime 24 maintains that its evidence, questionnaires from subscribers stating that they do not receive an acceptable picture over the air, sufficiently shows that its subscribers do not receive a grade B signal.

Under the SHVA, a satellite carrier such as PrimeTime 24, has the burden at trial of proving that its transmission of network programming goes only to "unserved households." 17 U.S.C. § 119(a)(5)(D). Although a party seeking a preliminary injunction bears the burden of showing likelihood of success on the merits,

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[9] As Magistrate Judge Johnson described in her Report, the Longley-Rice maps were created using the "Longley-Rice" propagation methodology. "This methodology was developed by U.S. government scientists, and now exists in the form of a computer program that can be obtained from an agency of the U.S. Department of Commerce. The methodology takes into account detailed data about the terrain that surrounds a particular television broadcast tower" and can be used to measure the intensity of a signal from a particular television station. See R&R at 17.

the court must consider that the ultimate burden of proof at trial is upon the nonmovant. See Deerfield Med. Ctr. v. City of Deerfield Beach, 661 F.2d 334, 336-38 (5th Cir. 1981)(in assessing likelihood of success on the merits, court took into account nonmovants ultimate burden of proof.) Thus, as noted in the Report, Plaintiffs can establish likelihood of success on the merits by demonstrating that PrimeTime 24 is unlikely to prove at trial that its subscribers are "unserved households." See R&R at 30.

a. PrimeTime 24's Evidence of Compliance with the SHVA

PrimeTime 24 has asserted that its efforts to comply with the SHVA demonstrate that Plaintiffs cannot succeed on the merits. PrimeTime 24 requires customer service representatives to ask all potential subscribers about their picture quality, and only sells its product to persons who state that they receive unacceptable pictures with a conventional rooftop antennae. See Obj. at 41. Furthermore, PrimeTime 24 states that it sends questionnaires to all of its subscribers who are challenged by the network stations, and only provides service to those subscribers who state that they receive unacceptable pictures. See Obj. at 41.[10] From this

[10] 17 U.S.C. § 119 requires PrimeTime 24 to provide each network a monthly list of all new subscribers receiving that

evidence, PrimeTime 24 argues that the Court should infer that its subscribers are among the people who do not receive a grade B signal.

The Magistrate Judge correctly rejected this argument. As the Report noted, "[t]here are a variety of reasons, unrelated to being an 'unserved household' why a customer might sign up for PrimeTime 24." R&R at 10. For instance, "viewers with access to additional network stations can watch network programs several hours later (or earlier) by watching a station from a distant time zone and can see sports programs (such as NFL football) that are not available locally." Id. In addition, subscribers to PrimeTime 24 receive many more television channels than with over-the-air antennas, without the need to install or maintain the antenna.

Furthermore, PrimeTime 24 again focuses on picture quality rather than on the FCC's objective test to determine whether a household is "unserved." As previously discussed, Congress established an objective test to determine which households a satellite carrier could rebroadcast network television without a license. The test is whether the household can receive a grade B

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network's programming. The network stations or their affiliates can then use those lists to "challenge" subscribers who they believe are not "unserved."

signal as defined by the FCC. Asking potential subscribers about picture quality, simply fails to provide evidence that such subscribers fit within Congress' definition.

Although PrimeTime 24 contends that a subscriber' perception of picture quality is an indicator of whether a household receives a grade B signal, Plaintiffs' evidence shows otherwise. As the Report states, "the only reliable data before the Court shows a strong relationship between signal strength and picture quality." See R&R at 20. Accordingly, the Court agrees with the Magistrate Judge's determination that PrimeTime 24 has failed to produce evidence that its subscribers meet the statutory standard for "unserved households."

b. Plaintiffs' Evidence of PrimeTime 24's Noncompliance with the SHVA

As a further reason why Plaintiffs cannot demonstrate a likelihood of success, PrimeTime 24 contends that Plaintiffs' Longley-Rice maps[11] were inadmissible evidence because the maps were hearsay under Fed. R. Evid. 802, and the expert testimony regarding the maps was inadmissible under Fed. R. Evid. 703. In addition, PrimeTime 24 disputes that Plaintiffs' signal strength tests at 100 locations in the Miami area were relevant because the testing

[11] Defined, supra at n.9.

methodology was flawed, and South Florida's topography is not representative of the Nation.

i. The Longley-Rice Maps

PrimeTime 24's argument that the Longley-Rice maps were inadmissible hearsay is meritless because "[a]ffidavits and other hearsay materials are often received in preliminary injunction hearings. The dispositive question is not their classification as hearsay but whether, weighing all the attendant factors, including the need for expedition, this type of evidence was appropriate given the character and objectives of the injunctive proceeding." Asseo v. Pan Am. Grain Co., 805 F.2d 23, 26 (1st Cir. 1986); See Levi Strauss, 51 F.3d at 985; McLaughlin v. Williams, 801 F. Supp. 633, n.10 (S.D. Fla. 1992) (Marcus, J.). Thus, even if the maps were hearsay, admission of the evidence was proper "giving due weight to the fact that PrimeTime 24 did not have the opportunity to confront the declarant, and the need for expedition . . . ." McLaughlin, 801 F. Supp. at n.10.

In any event, the maps were not inadmissible hearsay. When expert testimony is offered, it is admissible if it is reliable and relevant. See Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 591-93 (1993). Rule 703 of the Federal Rules of Evidence provides that experts may rely upon facts or data that are not